SUPREME COURT OF WISCONSIN

OFFICE OF LAWYER REGULATION

Public Reprimand With Consent

08-OLR-06

Edward J. Ritger
Attorney at Law

The Respondent, Attorney Edward J. Ritger, practices in Random Lake, Wisconsin.

On November 23, 2002, a woman (the deceased) died in an automobile accident when another woman ran a stop sign and hit the deceased's car. The other woman also died in the accident.

The deceased had two young adult children, a son and a daughter. Their father was recently divorced from the deceased and he and the son were named as co-personal representatives for the deceased's estate. They hired the Respondent, who had represented the father in the divorce, to probate the estate. The family, (son, daughter and father) agreed to pay Respondent $145 an hour for his services. There was no written fee agreement.

Respondent filed a petition for the administration of the deceased's estate on December 4, 2002.

Section 895.04(4) Wis. Stats. provides that damages for loss of society and companionship in a wrongful death action may be awarded in an amount not to exceed $350,000. In addition, pecuniary damages and damages for medical and funeral expenses may also be recovered.

The other woman's automobile insurance policy (first insurer) had a $150,000 policy limit. The deceased had underinsured motorist (UIM) benefits up to $300,000 with a different insurance company and an additional $5000 in coverage for medical payments. It was believed that additional amounts, up to the statutory limit, could be collected from the other woman's estate.

The family initially consulted other attorneys about the wrongful death matter, but decided they did not want to enter into a contingent fee arrangement. The family attempted to negotiate with the insurance companies themselves and thought they could handle the wrongful death matter on their own. Although not retained to handle the wrongful death matter at that time, Respondent agreed to file claims for the son and daughter in the other woman's estate. Those claims, in the amount of $350,000 plus costs, were filed on January 14, 2003.

On January 16, 2003, the UIM carrier also filed a claim with the other woman's estate for an amount "undetermined – likely to exceed $350,000."

Between January and August 1, 2003, the family, primarily the son and the father, had several contacts with the claims adjuster for the UIM carrier. The family understood from their contacts with the claims adjuster that the UIM carrier would pay their claim for underinsured motorist benefits only after the first insurer had paid its policy limits.

On August 1, 2003, a pre-trial conference was held in the other woman's estate. The family appeared in person and attorneys appeared for the other woman's estate and the two insurance companies. Respondent appeared by telephone, but notified the court that he had not been retained to represent the son and daughter in the matter.

Subsequent to August 1, 2003, Respondent agreed to represent the family with respect to their claims against the other woman's estate and with respect to the disposition of the insurance proceeds. In an August 13, 2003 cover letter to the court in the other woman's estate, Respondent stated:

> Please find enclosed a Notice of Retainer indicating that I have now been formally retained by [son and daughter] with respect to their claims against the estate of [other woman]. As part of that retainer, I am also authorized to represent them in connection with the disposition of the wrongful death proceeds arising from [first insurer] and [UIM carrier].

Although there was no written agreement, both Respondent and the family believed the agreement for an hourly fee of $145 continued. In his August 13, 2003 letter to the court, Respondent indicated that he was aware the deceased had two estranged adult children and that the insurance companies would require the estranged brothers' participation in settling the claims and providing releases. A copy of Respondent's retainer notice was sent to the attorney for the other woman's estate and the attorneys for the two insurance companies.

The family's understanding was that, as of August 13, 2003, they had hired Respondent to represent them with respect to probating the deceased's estate and with respect to the wrongful death claims. Additionally, the son stated in an affidavit that, "when the attorneys became involved," the UIM claims adjuster would no longer speak with him and told him he had to go through the attorneys.

Respondent believed the scope of his representation was limited and that he was only hired to negotiate settlements with the estranged brothers and obtain payment from the first insurer.

On August 18, 2003, the first insurer's attorney sent Respondent a letter acknowledging Respondent's August 13, 2003 letter and stating that his client was willing to pay its policy limit of $150,000, but would first require a release from the deceased's estate and all four of her natural children. The first insurer's attorney's August 18, 2003 letter further stated:

> Since there is a UIM carrier in the picture, it would be appropriate to send them a letter advising them that [first insurer] has offered its policy limit in this case and they may have the right to substitute funds in this matter if they wish to preserve any subrogation claim they have for any future UIM payments that may be made. Please copy me on that letter.

Respondent did not heed the first insurer's attorney's advice and sent the UIM carrier a letter notifying it that the first insurer had offered its policy limits. Based on the family's prior contacts with the UIM carrier's claims adjuster, Respondent believed the UIM carrier "…was ready to pay the underinsured motorist benefits from [the deceased's] policy as soon as [first insurer] paid its policy limits."

Respondent negotiated with the estranged brothers and each agreed to a $10,000 settlement. The first insurer's attorney sent Respondent a general release for all the parties to sign. The document released the first insurer, the other woman's estate and "…all other persons and organizations who are or might be liable, from all claims and for all injuries arising out of the death of [the deceased] as a result of an accident…" The release further stated, "By executing this release, we intend and agree that this release applies to all claims arising from said accident, present and future…"

In an October 11, 2004 affidavit, Respondent stated:

> I did not attempt to distinguish the kind of release provided by [first insurer], as I believed that both [first insurer] and [UIM carrier] knew the [family's] intention of pursuing the full statutory amount of $350,000 for their wrongful death claim plus funeral expenses.

On August 30, 2003, Respondent witnessed the son's and the father's signatures on the release. Respondent then sent the release to the estranged brothers for their signatures on September 10, 2003 and he also obtained the daughter's signature.

On or about September 25, 2003, Respondent returned the signed release to the first insurer's attorney. Respondent received the first insurer's check for $150,000 on October 1, 2003. Based on the family's prior contacts with the UIM carrier, Respondent thought the family could then proceed to collect additional amounts from the UIM carrier and the other woman's estate.

On October 13, 2003, Respondent wrote to the claims adjuster for the UIM carrier, enclosed a copy of the first insurer's check, and told the claims adjuster the proceeds were being held in his trust account. The letter concluded, "I understand that I am providing you with the copy of this check for possible substitution by your company."

The claims adjuster sent Respondent an October 23, 2003 letter informing him that the UIM carrier had lost its subrogation rights because the deceased's estate and her children had executed a general release in full and final settlement of their claims. The claims adjuster's letter informed Respondent that he had failed to provide the UIM carrier with notice of the first insurer's offer prior to accepting it, in violation of the UIM carrier's policy requirements and established case law.

Respondent admitted that, at the time, he was unfamiliar with the procedure for giving notice of settlement as prescribed in the case law.

Respondent met with the father, the son and the son's uncle on November 3, 2003 to discuss the insurance issues. According to those family members, Respondent told them he made a mistake by sending the executed release to the first insurer without prior notification to the UIM carrier, told them he had malpractice insurance, and said he would correct the mistake at his own expense.

Respondent wrote to the first insurer's attorney on November 7, 2003 and enclosed a trust account check for $150,000. Respondent asked for return of the release, explaining that his clients had signed it under the mistaken belief that it was a prerequisite to obtaining UIM coverage. The first insurer did not accept the check or return the release.

On November 7, 2003, Respondent also filed a wrongful death lawsuit against the two insurance companies and the other woman's estate asking, in part, for reformation of the release, and for damages for negligence and wrongful death. The plaintiffs in the lawsuit were the son and daughter, individually, and the son and the father as personal representatives of the deceased's estate. Although the family thought Respondent had agreed to absorb the costs of the lawsuit, Respondent stated his attorney's fees were to continue to be charged on an hourly basis and that it was understood that the fees and costs would be paid out of the proceeds of the lawsuit.

Respondent notified his malpractice insurance carrier of the lawsuit in March 2004.

On May 3, 2004, Respondent had a phone conference with a colleague about the possibility of retaining him as co-counsel in the wrongful death case. The colleague subsequently agreed to enter the case as Respondent's co-counsel, and he filed a notice of retainer on May 27, 2004.

Respondent's malpractice carrier hired an attorney to represent its and Respondent's interests in the wrongful death matter. In a May 14, 2004 letter to co-counsel transmitting the file, Respondent stated:

> …as you can see from the recent correspondence from [malpractice carrier], some consideration was given to having [attorney hired by malpractice carrier] be the attorney of record instead of your firm. In the end, the conclusion was reached that [malpractice carrier's attorney] really would have a conflict of interest representing me as an insured of [malpractice carrier] as well as [the family].

On May 26, 2004, the malpractice carrier's attorney wrote to the new co-counsel, stating that he had been retained by the malpractice carrier "…to assist them in reviewing this claim and helping to get it resolved."

On June 30, 2004, co-counsel filed an amended complaint in the wrongful death lawsuit which, among other things, added the deceased's estate, in addition to the personal representatives, as a plaintiff.

The family said Respondent told them he would be responsible for co-counsel's fees. Respondent said he told the family he would be responsible for co-counsel's fees only if there was no recovery from the UIM carrier. Respondent believes this conversation occurred around April 2004. The family denies that Respondent conditioned his commitment to pay co-counsel's fees on a failure to recover from the UIM carrier.

Despite the apparent recognition in his May 14, 2004 letter to co-counsel of a conflict of interest, Respondent remained co-counsel in the wrongful death lawsuit until he was granted permission by the court to withdraw on November 19, 2004. The family did not sign a written consent to Respondent's continued representation. The court signed the order substituting co-counsel as counsel of record (hereafter "successor counsel") on December 21, 2004.

Successor counsel said that, in a general sense, a potential malpractice claim against Respondent was apparent at the time he (successor counsel) was hired in May 2004. Successor counsel emphasized, however, that he was not hired to pursue a malpractice claim against Respondent. Nevertheless, successor counsel said that by late October 2004, he believed there were indications that the court might not reform the release, and he said it was at that time that he began to consider proposing a mediated settlement that would include participation by Respondent and his malpractice carrier. Successor counsel said it was at that point that he advised Respondent to withdraw from the wrongful death representation.

Although Respondent remained as co-counsel in the lawsuit until November 2004, successor counsel stated that after he was hired in May 2004 his firm assumed exclusive responsibility for the case and Respondent was only nominally involved. Nevertheless, both successor counsel's and Respondent's billing records indicate that successor counsel's office had numerous contacts with Respondent and continued to keep Respondent up-to-date on the wrongful death lawsuit, both before and after Respondent's withdrawal in November 2004. Respondent also had several direct contacts with the family pertaining to the lawsuit.

Even though the deceased's estate and its personal representatives, the son and his father, were plaintiffs in the wrongful death lawsuit, Respondent continued to represent the deceased's estate until another attorney was substituted for Respondent on June 23, 2005.

Respondent said when the family was in his office on estate business, if questions came up about the wrongful death lawsuit Respondent, as an accommodation, would call successor counsel's office, via speaker phone, from his office. Respondent recalls that at some point, it was suggested that Respondent not participate in such discussions because, after he had withdrawn, they would not be within the scope of attorney-client privilege.

Successor counsel said he recommended to the family that Respondent, represented by his malpractice carrier's attorney, be involved in mediation, even though Respondent was not a party to the lawsuit. Successor counsel said he explained to the family that Respondent would be present at the mediation as an adverse party. Additionally, successor counsel said he explained to the family that he represented the estate only for purposes of the insurance litigation and at mediation, and that Respondent represented the estate in all other matters.

On March 28, 2005, successor counsel's associate sent a Confidential Mediation Statement letter to the mediator, which outlined the facts and the family's position. The letter asked for the wrongful death statutory amount of $350,000 plus over $9000 in funeral expenses, $5200 for pecuniary damages and approximately $22,000 in interest. Due to the delays in settling the claim, the letter also asked for attorneys fees in an amount over $46,000. The letter further stated, "Additionally, if the upcoming mediation is unsuccessful in resolving this case, the [family] will have to sue [Respondent]."

The case went to mediation on April 1, 2005. Respondent, represented by his malpractice carrier's attorney, attended, as did successor counsel, the father, the son, and the daughter. The case settled at mediation for $320,000, with the first insurer responsible for $150,000, the UIM carrier for $90,000, Respondent and his malpractice carrier for $35,000, and the other woman's estate for $45,000. The settlement released Respondent from any potential malpractice claims and further stated that, while Respondent waived his fees for the wrongful death matter, he was entitled to his fees for the deceased's estate.

The family states that successor counsel advised them to agree to the settlement because it was the best they could get and told them if they did not agree they would have to find another attorney. The family states they were told that successor counsel's fees, after a reduction by successor counsel of $10,000, would be deducted from the settlement proceeds. Successor counsel's final bill was approximately $40,000.

Respondent's time records for his work on the estate and for his work on the wrongful death matter were originally kept as one combined billing record. Respondent said he had his staff "segment" his work on the wrongful death matter from his work on the probate matter. The family was ultimately ordered by the probate court to pay Respondent $11,432.70 for fees and costs incurred by Respondent in probating the deceased's estate. The order was based on a bill submitted by Respondent for that amount. That bill included several entries prior the date the wrongful death action was commenced in November 2003, which related to the first insurer's release and dealings with the UIM carrier.

By having his clients sign the first insurer's general release, which released all parties from further liability, without attempting to distinguish the kind of release provided by the first insurer; by failing to familiarize himself with the UIM carrier's policy requirements regarding notice, or with the procedure, as set forth in case law, for giving notice of settlement offers to additional insurers; by failing to heed the first insurer's attorney's advice to give notice to the UIM carrier that the first insurer had offered its policy limit; and by submitting the executed general release to the first insurer, Respondent violated SCR 20:1.1, which states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

By remaining as co-counsel in his clients' wrongful death lawsuit for several months after he became aware, at least by May 14, 2004, that he had a conflict of interest due to the potential for a malpractice claim against him by his clients, Respondent violated former SCR 20:1.7(b), effective prior to July 1, 2007, and SCR 20:1.16(a)(1). Former SCR 20:1.7(b) stated:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> > (1) the lawyer reasonably believes the representation will not be adversely affected; and
> >
> > (2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

SCR 20:1.16(a)(1) states, in relevant part:

> …[A] lawyer shall not represent a client or, where the representation has already commenced, shall withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law.

By continuing to represent the deceased's estate after he became aware, at least by May 14, 2004, that he had a conflict of interest with the estate, its heirs and its personal representatives because they were the plaintiffs in the wrongful death lawsuit and, particularly, by failing to withdraw as counsel for the deceased's estate when he was an adverse party at mediation for the lawsuit, at which mediation he negotiated a settlement of the wrongful death lawsuit that relieved him of any potential malpractice claims by the plaintiffs and secured him the right to collect his attorney's fees for the estate, Respondent violated former SCR 20:1.7(b), effective prior to July 1, 2007, and SCR 20:1.16(a)(1).

Respondent has prior discipline. Respondent received a private reprimand in 1996 in connection with his representation of a lending agency. In that matter, Respondent was found to have violated SCR 20:1.3, SCR 20:1.4(a), effective prior to July 1, 2007, and also SCR 21.03(4) and SCR 22.07(2), two former rules governing cooperation in an investigation. In 2003 Respondent was privately reprimanded for communicating with a represented party, contrary to SCR 20:4.2. In 2005, Respondent received a public reprimand for violations of former SCR 20:1.7(a) and former SCR 20:1.4(a), both effective prior to July 1, 2007, and for a violation of SCR 20:1.3. In that matter, Respondent represented an estate and its co-personal representatives at the same time that he represented one of the co-personal representatives personally as a claimant against the estate. Respondent also failed to keep the other co-personal representative informed about the status and progress of the estate proceedings, and failed to advance the interests of the estate for over two years.

In accordance with SCR 22.09(3), Attorney Ritger is hereby publicly reprimanded.

Dated this 6th day of May, 2008.

SUPREME COURT OF WISCONSIN

/s/ Henry A. Field, Jr.
Henry A. Field, Jr., Referee